PAGE

ARGUMENT

I. A. England v. Louisiana State Board is not in point 17

B. There is no basis for the application of res judicata 19

C. The Court's judgment does not transgress the Section 2283 prohibition 22

D. The District Court was not required to abstain 24

II. The Regents' Rules violate the speech and association rights of the Young Democrats and Young Socialists 27

A. The nature of the issue 27

B. The University campus is an appropriate place for the exercise of First Amendment freedoms 29

C. The regulations constituted an unreasonable direct restraint upon speech 30

D. The regulations suffer from unconstitutional vagueness and overbreadth 31

E. The regulations under attack must fall as simple licensing regulations 32

CONCLUSION 33

PAGE

Table of Authorities

Cases:

Allen v. State Board of Elections, 393 U.S. 544 (1969) 2

Baggett v. Bullitt, 377 U.S. 360 (1964) 26

Elfbrandt v. Russell, 384 U.S. 11 (1966) 32
England v. Louisiana State Board, 375 U.S. 411 (1964) 6, 15, 16, 17, 18, 19, 26

G. C. Merriam Co. v. Saalfield, 241 U.S. 22 (1916) 22
Ginzberg v. United States, 383 U.S. 463 (1966) 17, 30
Great Lakes Dredge Co. v. Huffman, 319 U.S. 293 (1943) 23
Griffin v. County School Board of Prince Edward County, 377 U.S. 218 (1964) 2

Hansberry v. Lee, 311 U.S. 32 (1940) 20, 21
Harman v. Forssenius, 380 U.S. 528 (1965) 26

Lansburgh and Bros. v. Clark, 127 F.2d 331 (D.C. Cir., 1942) 21

McClellan v. Carland, 217 U.S. 268 (1910) 25
Miers v. Brouse, 154 Tex. 54, 271 S.W.2d 419 (1954) 22
Moody v. Flowers, 387 U.S. 97 (1967) 2

NAACP v. Button, 371 U.S. 415 (1963) 30
New York Times v. Sullivan, 376 U.S. 254 (1964) 30

Phillips v. United States, 312 U.S. 246 (1941) 2

Rorick v. Board of Commissioners, 307 U.S. 208 (1939) 2

PAGE

Schneider v. State, 308 U.S. 147 (1939) 29
Staub v. Baxley, 355 U.S. 313 (1958) 17, 32
Sweezy v. New Hampshire, 354 U.S. 234 (1957) 29

Texas Foundries v. International Molders Union, 151 Tex. 239, 248 S.W.2d 460 (1952) 22
Tinker v. Des Moines Independent School District, 393 U.S. 503 (1968) 29

United Mine Workers v. Illinois Bar Association, 389 U.S. 217 (1967) 31

West Virginia Board of Education v. Barnette, 319 U.S. 624 (1943) 29
Willcox v. Consolidated Gas Co., 212 U.S. 19 (1909) 19, 26
Wisconsin v. Constantineau, —— U.S. ——, 91 S. Ct. 507 (1971) 26

Younger v. Harris, —— U.S. ——, 91 S. Ct. 746 (1971) 16, 17, 24, 25, 26, 31

Zwickler v. Koota, 389 U.S. 241 26

Constitutional Provisions:

United States Constitution
First Amendment 6, 9, 10, 16, 17, 18, 26, 27, 29, 30, 31
Fourteenth Amendment 6, 26, 27

Federal Statutes:

28 U.S.C. §2281 ..... 1, 7
28 U.S.C. §2283 ..... 6, 15, 22, 24

PAGE

State Statutes:

Tex. Rev. Civ. Stat. Ann.
Art. 2606c-3 2
Art. 2606c-4 2
Art. 2919e, sec. 2, 10 (Supp. 1970-71) 2, 3

Rules:

Texas Rules of Civil Procedure
20 9
20(a) 8
42 21
56 10

Board of Regents' Rules
611 ..... 3, 6, 7, 10, 11, 14, 28, 32
612 ..... 4, 5, 6, 10, 14, 28, 32

Other Authorities:

Barron and Holtzoff, Wright, *Federal Practice and Procedure*, §532 21

Carroll, *Alice's Adventures in Wonderland*, Chapter 4 18

Emerson, *The System of Freedom of Expression* (Random House, 1970) 31

McDonald, Texas Civil Practice, Vol. I, Section 3.37 (1965 Revision) 21-22

Registrar, University of Texas at Austin, "Report of Distribution of Students by Age and Sex" 29

Wright, *The Constitution on the Campus*, 22 Vand. L. Rev. 1027 (1969) 29

Wright, *Handbook of the Law of Federal Courts*, §52 (2nd Ed., 1970) 25

IN THE

Supreme Court of the United States

OCTOBER TERM, 1971

No. 70-55

BOARD OF REGENTS OF THE UNIVERSITY OF TEXAS SYSTEM,

Appellant,

—v.—

NEW LEFT EDUCATION PROJECT, *et al.*,

Appellees.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF TEXAS, AUSTIN DIVISION

BRIEF FOR APPELLEES

Jurisdiction

Appellees reassert that this matter did not require the convening of a three-judge court, and as a consequence the appeal should be dismissed for lack of jurisdiction.

We agree with Appellant that the judgment (A. 176) was intended to be the judgment of a three-judge court and consider it immaterial that it was signed by only a single judge. The question is whether an injunction against a Regents' rule governing campus conduct requires a three-judge court under 28 U.S.C. §2281.

"The reconciling principle" of the cases under Section 2281 is a "procedural protection against an improvident

state-wide doom by a federal court of a state's legislative policy," *Phillips* v. *United States*, 312 U.S. 246, 251 (1941). It has been consistently the view that "congressional enactments providing for the convening of three-judge courts must be strictly construed," *Allen* v. *State Board of Elections*, 393 U.S. 544, 561 (1969). This Court has been uniformly of the view that:

> "'Despite the generality of the language' of that Section, it is now settled doctrine that only a suit involving 'a statute of general application' and not one affecting a 'particular municipality or district' can invoke [Section 2281]" *Rorick* v. *Board of Commissioners*, 307 U.S. 208, 212 (1939); *Griffin* v. *County School Board of Prince Edward County*, 377 U.S. 218, 228 (1964); *Moody* v. *Flowers*, 387 U.S. 97, 101 (1967).

While recognizing that the actions of the University of Texas Regents have impact beyond the Austin, Texas campus, Board rules and regulations are not of general application, nor do the rules affect a significant percentage of the public institutions of higher learning in Texas. The Higher Education Coordinating Act of 1965 listed at that time thirty-one "public junior colleges" and twenty-three "general academic teaching institution[s]" functioning in the state. Of these fifty-four colleges only three were, and are, under the jurisdiction of the University of Texas Regents,[1] Tex. Rev. Civ. Stat. Ann., article 2919e, sec. 2 (Supp. 1970-71).

---

[1] There are in addition certain medical and dental schools under the jurisdiction of the Board of Regents. The listing in Regents' brief (p. 5-6) includes institutions which are only in the planning stage, e.g. the University of Texas at San Antonio (Art. 2606c-3) and the University of Texas of the Permian Basin (Art. 2606c-4).

This same statute created the Coordinating Board, Texas College and University System which, according to the statute, "shall represent the highest authority in the State in matters of Public Education," *(id. sec. 10)*. Thus the Board of Regents of the University of Texas System is a subordinate body within the structure of the state's higher education system and the rules of the Board affect only a fragment of the institutions of higher learning in Texas. Under the circumstances we continue in the view that a three-judge court was not required.

Regulations Involved

The Plaintiffs attacked two intertwined regulations of the Board of Regents which restricted solicitation on the campus of the University of Texas at Austin. The Regents have for the first time conceded partial invalidity of the regulations (Brief, p. 41). Nevertheless, both regulations remain at issue because of the limited concession of unconstitutionality and because the two regulations are interwoven beyond extrication. The regulations the court below found unconstitutional are here reproduced.

1. Commercial solicitations will not be authorized on the campus of any component institution of The University of Texas System, except as otherwise provided in this section. Commercial solicitations include the sale, contract of sale, advertisement or promotion for sale, disposition of or contract to dispose of any item of personal property; the inducement of any person, group, or organization to contract with regard to any item of personal property, service, or anything that the offerer may offer; or the solicitation of funds or personal property.

The following commercial solicitations are permissible:

(1) commercial solicitations in a Student Union Building that have been approved by the Board of Directors or by the appropriate union governing body subject to applicable institutional rules and regulations and applicable Regents' Rules and Regulations;

(2) the sale of any authorized student publication or any publication authorized by an agency of a component institution;

(3) any commercial solicitation made pursuant to a contract or agreement between the administration of a component institution and the vendor;

(4) the sale of any newspaper or other publication by means of a vending machine located in a campus building, if a certain area or areas within a campus building have been designated in advance by the institutional head or his representative as appropriate for such sales; and

(5) any commercial solicitation necessary for the normal administration, operation, and maintenance of any component institution as an educational institution.

2. No noncommercial solicitations, including fund raising for charity, shall be permitted on a campus of a component institution of The University of Texas System without the prior approval of the institutional head or his delegate.

6.121 Such approval by the institutional head may be granted for solicitation or fund raising for the

needy or suffering, relief of the poor, or for public benevolent purposes, but it may not be granted for the personal benefit of an individual, group, or registered student organization, to pay for monetary indebtedness incurred by an individual, group, or registered student organization, to pay any fee, fine, or other charge arising from a violation of federal, state, or local law.

6.122 Any noncommercial solicitation, including fund raising for charity, that is approved by the institutional head or his delegate shall be conducted in accordance with reasonable institutional regulations regarding time, place, procedure and financial reporting and accountability.

6.123 Notwithstanding the provisions of Section 6.121 above, with the approval of the institutional head or his delegate, a registered student organization may solicit or raise funds from its own members for the benefit of the organization but only at official meetings of the organization.

Questions Presented

Appellant's questions do not fairly state the issues.

1. Appellant's Question 1 presumes a matter highly in dispute, i.e. that all Plaintiffs were part of the same "class." In our view the record will not sustain this assertion and hence the question does not fairly raise the issue.

2. Appellant's Question 2, and the argument thereunder, distorts the judgment of the court below both as to intent and effect, for the court below never purported to "stay proceedings in the state court."

3. Appellant's Question 3 is too narrow. In our view the constitutionality of Regents' Rule 6.12 (set out above) remains at issue.

Appellees consider the following questions to be presented:

1. Did the court below properly refuse to abstain?

2. Do Regents' Rules 6.11 and 6.12 violate the speech and association rights of the Young Democrats and Young Socialists as guaranteed by the First and Fourteenth Amendment?

Statement of the Case

Essential to the Regents' arguments is the contention that all Plaintiffs were members of a single class, those that are before this Court as Appellees and the original plaintiffs who were severed, dismissed and relegated to the state court.[2] Because this contention does not fairly state either the position of the Plaintiffs below or the action of the three-judge court, we are compelled to expand substantially Regents' statement of the case.

---

[2] "Regents theory in the application of these principles [*England* and *res judicata*] is dependent upon its contention that 'Part A' Plaintiffs and 'Part B' Plaintiffs are, as they themselves alleged and argued in the court below, members of the same class." (Appellant's Brief, p. 26.) Although the argument is somewhat obscure, the same contention presumably underlies Regents' argument under 28 U.S.C. Section 2283 (Brief, p. 30).

The Evolution of the Case

1. The Original Plaintiffs.

Suit was begun on August 1, 1969 by a group of Plaintiffs denominated by the court below as "Part A" Plaintiffs. They sued on their own behalf and on behalf of a class comprised of "those persons who may be now or in the future associated or engaged in the publication and/or distribution of 'The Rag'"[3] (A. 4). They sought to enjoin the Regents from further prosecution of a state court action which had been instituted to restrain the distribution on the University campus of an underground newspaper known as "The Rag." The Regents answered, alleging among their defenses, that the court "should dismiss the action because all of the issues sought to be raised by plaintiffs can be fully resolved in the prior civil proceeding against them pending" in the state court (A. 10). The Regents also suggested the necessity of a three-judge court, asserting that the regulation in question "Section 6.11" of the Regents' rules constituted an administrative order within the meaning of 28 U.S.C. 2281 (A. 15).

2. The Motion to Amend and Join Plaintiffs.

On November 7, 1969, before the court had acted on the initial contentions of the Regents, Plaintiffs filed a Motion for Leave to Amend asserting that "new parties plaintiff desire to join in this action to assert the infringement of their own constitutional rights" and alleging that since the filing of the initial complaint the rules and regulations

[3] These Plaintiffs were denied relief and dismissed by the court's order of December 17 (A. 41). There was never a determination as to the propriety of the purported class.

under consideration had been "substantially amended" (A. 20-21). The amended complaint sought to join as a plaintiff the Young Democratic Club at the University of Texas, alleging that in the past the club had "been permitted to solicit dues from members on the campus of the University at the time the member made application for membership" (A. 26) and that the Regents now sought to prohibit this "traditional" means of securing membership and membership contributions, thereby depriving the Young Democrats of the "only effective way of securing their timely dues payment" (A. 26). In a separate paragraph of the complaint a new class of plaintiffs sought to join the action, alleging that they were individual students at the University of Texas having an interest in the "free flow [of] ideas and the flourishing of public debate at the University of Texas" (A. 24). Neither the Young Democrats nor the new "class" alleged any interest in the distribution of "The Rag" and neither sought to intervene as a member of the original class, seeking only joinder pursuant to Rule 20(a).

The Regents opposed joinder asserting that the contentions of the Young Democrats involved "different rules" than those at issue between the Regents and "The Rag" and that "[t]o allow these two distinct claims to be presented in a single law suit would delay and complicate this litigation . . . " (A. 35). Alternatively the Regents asserted that if joinder was allowed the court should sever the claim of the Young Democrats from that of "The Rag" plaintiffs (A. 35). The Plaintiffs responded claiming it would "be burdensome on the federal judiciary to compel the Young Democrats to file a separate action, thus requiring the convening of a second three-judge court" (A. 38).

3. The Court's Order Allowing Joinder Under Rule 20 and Severing and Dismissing the Original Plaintiffs.

On December 17th the Court disposed of all pending matters, allowing amendment of the complaint and joinder of the new parties. The Court simultaneously effected a severance. The original plaintiffs ("Part A") who were defendants in the pending state court action, were dismissed "so that there will be no interference with the state court's exercise of its jurisdiction" (A. 42). As to the Young Democrats and the individuals joined that day ("Part B" plaintiffs), the Court retained jurisdiction for "further proceedings" (A. 43).

4. The Intervention of the Young Socialist Alliance.

On January 8, 1970, the Young Socialist Alliance sought to intervene as a party plaintiff as a "member of a class of persons interested in the full enjoyment of First Amendment rights for all those in attendance at the University of Texas as described in paragraph III(c) of Plaintiff's First Amended Complaint" (A. 45). The intervention motion incorporated a disciplinary notice from the University of Texas charging that the Young Socialists had failed "to comply with regulations regarding the selling of literature and the installation of a booth" (A. 46). No opposition to the intervention was filed and on February 10, 1970, intervention was allowed (A. 48).

The Disposition of the Case

1. The Motion for Summary Judgment.

"The Plaintiffs in Part B of this action together with the Young Socialist Alliance" (A. 56) moved for summary

judgment pursuant to Rule 56 asserting that Regents' Rules 6.11 and 6.12 violated the First Amendment rights of their respective organizations.[4]

2. The Evidence and Contentions of the Parties.

The Young Democrats had "functioned" on the University campus for many years engaging in "activities typically associated with any political organization," including "the solicitation of members to join the organization and to work in political endeavors" (A. 58). In the fall of 1969 the Regents for the first time applied regulations (Sections 6.11 and 6.12) to the Young Democrats prohibiting solicitation of membership dues on the campus (A. 58). Although the Regents later modified the regulations to permit dues solicitation during registration,[5] the Young Democrats asserted that despite this relaxation of the Regents' rules their organization was nevertheless denied the right to solicit dues during the balance of the year and prohibited from selling political literature on the campus. The affidavit of Mr. Dolfi, President of the Young Democrats, concluded:

> "Although we can erect a booth and can distribute literature so long as we do not levy a charge for it, this limitation imposes substantial economic hardship upon our organization and limits our capacity to discharge our function as a political organization."

[4] When the motion was orally submitted, Regents conceded that there was no factual issue that required further development (Transcript of Proceedings, June 26, p. 44).

[5] This represented the second modification of the rules in question following the filing of the suit; the Young Democrats accordingly solicited membership dues during registration for the spring semester of 1970 (A. 58-59).

> It continues to be commonplace for various organizations with University approval to sell on these areas of the campus items for fund raising purposes . . ." (A. 59).

The Young Socialists had existed at the University since 1960, as "an independent Socialist organization, having as one of its principal goals the dissemination of political ideas" (A. 61). The organization customarily sold "The Militant," the weekly newspaper of the Socialist Workers' Party and books and tracts on Socialism (A. 61), "not for the purpose of making a profit for the organization but solely to disseminate political speech" (A. 62). The Young Socialists, as the Young Democrats, with permission from the University frequently erected booths on the West and Main Malls of the campus to distribute literature (A. 62, 137-9).

In December of 1969 charges were brought against the Young Socialists under Rule 6.11 "regarding the selling of literature" (A. 65),[6] while the Socialists were charged with selling literature. The University of Texas Choir was permitted at the same time to maintain an adjacent booth selling cookies for the purpose of defraying expenses for travel to Europe (A. 63). The parties stipulated that "typically there are three or four booths erected along the West Mall of the campus of the University of Texas at Austin distributing literature, sometimes there are as many as fifteen such booths and sometimes none.

[6] The Regents' answer asserted that the Young Socialists had obtained permission to sell and distribute literature within the Student Union of the University but had "exceeded such permission and sold and distributed said literature upon the West Mall of the campus of the University of Texas at Austin in violation of Regents' Rule 6.11" (A. 105).

Such booths are also permitted on the Main Mall of the campus. These booths are maintained in conformity with existing University rules" (A. 160).

In opposition to summary judgment the Regents tendered the affidavit of the Assistant Dean of Students, who described University practice:

> "If a student or organization desires to distribute a leaflet a copy is deposited with my office. . . . I review . . . to make sure that it is not obscene, vulgar or libelous or that it does not advocate the deliberate violation of any federal, state, or local law. Furthermore the material must not involve commercial solicitation. If the material complies with these rules its distribution is allowed without further regard to its content.
>
> My duties further require the granting or withholding of permission to both students and organizations to raise funds. If the purpose of the solicitation . . . is 'for the needy or suffering, relief of the poor, or for public benevolent purposes' it comes within the non-commercial provision of the Regents' Rules and permission is granted. . . . If the proposed activity comes within the category of commercial solicitation that is not allowed according to the applicable Regents' Rule then permission is not given. . . . One example of permissible non-commercial solicitation was a balloon sale by a committee of the Students Association in January of this year. The purpose of the sale was mainly to draw attention to the unfortunate circumstances of the poor people in East Austin" (A. 74).

Chairman of the Board of Regents, Frank C. Erwin, Jr., described the purpose of the University's regulations:

> "The University does not want solicitors or salesmen . . . coming onto a campus, walking up and down the walks, walking up and down the halls, and knocking on doors trying to solicit funds or sell their wares, thus interfering with the academic activities of the institution. The rules as they are presently drawn are simply a distillation of efforts over a period of years to draft rules that will prohibit that kind of solicitation and selling" (A. 153).

Exceptions to the prohibition against commercial solicitation included such activities as sale of life and hospitalization insurance by the Students Association (A. 133), selling of University publications on campus, and the daily distribution of the Daily Texan, containing substantial commercial advertising (A. 131, 160, see attachment Stipulation).

3. The Court Judgment.

Following oral submission the court entered its memorandum opinion on September 3, 1970. The court found that the Regents' Rules "seriously impede the associational activities of the organizations" (A. 163) and "a great deal of commercial and non-commercial solicitation coming within the heretofore noted exceptions to the Rules is allowed on the Austin campus" (A. 169). The court found sufficient "ambiguity" in the coverage of the Rules "to warrant considering the rules together for the purposes of the overbreadth question raised by the plaintiffs" (A. 169). The court concluded that the rules were "unreasonably restrictive of the clearly protected activities engaged

in by the plaintiffs in this case . . . . The Regents have simply failed to speak with that small caliber precision required of regulations touching First Amendment rights" (A. 171).

The decision left the way open for the Regents to "prohibit activity disruptive of the educational processes on campus" and to formulate reasonable rules to the extent that "campus congestion" or "litter" is a concern (A. 172).

The court further found that the rules constituted simply "licensing regulations that do not set out adequate guidelines for the exercise of the licensing" authority (A. 172). In accordance with the memorandum opinion a judgment was entered enjoining the Regents from enforcing against the plaintiffs Articles 6.11 and 6.12 (A. 177).[7]

The State Court Proceeding

On February 25, 1970, the state court heard and issued a temporary injunction against the original federal plaintiffs together with other defendants that had been added by amended pleadings (A. 120). None of the current federal plaintiffs were ever parties in the state court. According to the Regents' pleading the state action was concerned only that "Defendants, and each of them, are selling and distributing for a valuable consideration or causing to be sold and distributed for a valuable consideration" copies of "The Rag" (A. 122). There has been no suggestion that

---

[7] The judgment did not include the original plaintiffs for as the court opinion noted: "At the same time, the court refused the original plaintiffs declaratory and injunctive relief and dismissed them as plaintiffs so that there would be no interference with the state judge's adjudication of the proceedings pending against them in state court" (A. 165).

any of the present federal plaintiffs were in any manner associated with "The Rag." There has been no further activity in the state court since issuance of the temporary injunction.

Summary of Argument

I. The rationale of *England* v. *Louisiana State Board*, 375 U.S. 411 (1964) may not be invoked against the Appellees for the simple reason that they were never parties to a state court proceeding and hence could not have "elected to forego" their right to litigate constitutional claims in the federal court.

Essential elements of res judicata are missing and to invoke res judicata to bar the Appellees would deprive them of due process. The Young Democrats and Young Socialists were never made parties to the state court proceeding. The state court proceeding was not a class action and even if it was the class did not embrace the Appellees. Every event led the Young Democrats and Young Socialists to the logical conclusion that their rights were being exclusively litigated in the federal court and it would be a manifest deprivation of due process to now deprive them of their choice of a federal forum.

Putting aside the question of parties, even if the Young Democrats or Young Socialists could somehow be deemed participants in the state court proceeding, the state court simply granted a temporary injunction, and as an interlocutory order it cannot sustain res judicata.

Regents improperly invoke the prohibitions of 28 U.S.C. Section 2283 because the district court judgment, and the

accompanying opinion, are clear; the court did not intend, and did not stay any state court proceedings.

None of the conventional reasons for abstention by the federal court are here present, and notions of comity do not mandate the federal court to stay its hand. There was no unsettled question of state law that might avoid the constitutional issue, rather regulations of the Board of Regents, as "construed and applied," *Younger* v. *Harris,* 91 S. Ct. at 752, unreasonably restricted First Amendment rights of the Young Democrats and Young Socialists. Once the federal court dismissed all plaintiffs who were participants in the state court proceeding, there remained no reason for abstention for the only potential conflict resulted from the pendency of related questions in the state and federal courts, and this "potential conflict" is insufficient to require abstention. The Young Democrats and Young Socialists having properly invoked the jurisdiction of the federal court, should not be compelled to accept a state court's determination of those claims, *England* v. *Louisiana State Board,* 375 U.S. 411 (1964).

II. The Regents, under the guise of regulating solicitation, prohibited the Young Democrats and the Young Socialists from soliciting membership contributions and from selling political literature on the campus. There were no compelling interests to support this restriction for indeed the physical areas which the Young Democrats and Young Socialists sought to use are consistently used for the distribution of literature, the sale of University sanctioned material and solicitation of charitable contributions. Under the circumstances it is unreasonable to prohibit the Democrats and Socialists from engaging in First Amendment

activities in these areas so traditionally associated with the exercise of those freedoms. The Regents may not justify the embargo against the activities of the Young Democrats and Young Socialists merely because there is a commercial connotation because "commercial activity, in itself, is no justification for narrowing the protection of expression secured by the First Amendment," *Ginzberg* v. *United States,* 383 U.S. 463, 474 (1966).

The Regents' regulations further suffer from vagueness and overbreadth as "construed and applied" and hence are vulnerable to constitutional attack, *Younger* v. *Harris,* —— U.S. ——, 91 S. Ct. 746, 752.

Finally the regulations constituted simply licensing regulations which reposed unfettered discretion in the administrator to grant or deny permits for distribution without ascertainable standards and hence violated constitutional guarantees, *Staub* v. *Baxley,* 355 U.S. 313 (1958).

ARGUMENT

I.

A. *England* v. *Louisiana State Board is not in point*

Regents argue that proper application of the principles of *England* v. *Louisiana State Board,* 375 U.S. 411 (1964) requires reversal of the lower court judgment. The argument takes the following form: (1) The district court should have required the Young Democrats to "follow their 'Part A' brethren to the state court and intervene in that pending action" (Brief, p. 23).[8] (2) The "Part A" plain-

[8] This argument fails to speak to the Young Socialists who were allowed to intervene in February (A. 48), several months after the departure of the "Part A" plaintiffs who were dismissed in December (A. 41-43).

tiffs who were severed and dismissed have "unreservedly" presented their First Amendment contentions to the state court (Brief, p. 25).[9] (3) Hence in order to set matters right, the Young Democrats should be treated as if they had been sent to the state court and, once there unreservedly litigated their constitutional claims and thus forbidden to assert their constitutional claims in the federal court.[10] Regents' tortured analysis does not square with *England*. The court's opinion in *England* is explicit:

> "If a party freely and without reservation submits his federal claims for decision by the state courts, litigates them there, and has them decided there, then . . . he has elected to forego his right to return to the District Court." 375 U.S. at 419.

Neither the Young Democrats, nor the Young Socialists was ever in the state court; they were not made parties defendant by the Regents nor were they remanded to the state court as the Regents contend they should have been. The lower court disposed of Regents' contention quite simply:

> "The remaining plaintiffs, having never even been in the state court, can hardly be held to have relinquished their right to return, especially since this Court's earlier order left those plaintiffs in this Court for 'further proceedings' in their case" (A. 167).

---

[9] Inasmuch as the "Part A" plaintiffs have not sought to return to the federal court, and because we consider the Regents' arguments so meretricious, no attempt will be made to speculate as to the proper application of the *England* principles to the "Part A" plaintiffs should they indeed seek to return to the federal court.

[10] This argument is reminiscent of Lewis Carroll. " 'Contrariwise,' continued Tweedledee, 'if it was so, it might be; and if it were so, it would be; but as it isn't, it ain't. That's logic.' " *Alice's Adventures in Wonderland,* Chapter 4.

A concomitant of the court's decision in *England* is the recognition that "the right of a party plaintiff to choose a Federal court where there is a choice cannot be properly denied," *Willcox* v. *Consolidated Gas Co.*, 212 U.S. 19, 40 (1909); *England* v. *Louisiana State Board*, 375 U.S. at 415.

The Young Democrats and Young Socialists were entitled to seek relief in the federal courts and nothing in the rationale of *England* warrants denial of their choice of forum.

B. *There is no basis for the application of res judicata*

Regents' *res judicata* arguments extend and exacerbate the arguments made under *England* v. *Louisiana State Board, supra.* This argument seems to say that because the federal court should have dismissed the Young Democrats "to follow their 'Part A' brethren to the state court and intervene in that pending action" (Brief, p. 23) that this "error" should now be rectified by binding the Young Democrats by the state court proceeding. Such an argument offends fundamental notions of due process, for not only did the Young Democrats not participate in the state court proceeding, nothing that occurred suggested they were considered to be participants.

The order of the three-judge court which severed and dismissed the "Part A" plaintiffs assured the Young Democrats that their contentions would "be considered by this court in further proceedings" (A. 43). Some months later the Young Socialist Alliance was told that its motion to intervene in the federal proceeding was "meritorious" and that it would be "allowed to intervene as a party plaintiff" (A. 48). Similarly, nothing transpired in the state court

to suggest to the Young Democrats or the Young Socialists that they were in any way considered to be parties in that proceeding, Regents' state court pleadings named a number of defendants (A. 89). The Young Democrats and Young Socialists were never named as parties.[11] The state court pleadings described the defendants as engaged in "selling and distributing for a valuable consideration or causing to be sold and distributed for a valuable consideration a newspaper known as 'The Rag'" (A. 91), it has never been suggested that either the Young Democrats or the Young Socialists was engaged in the distribution of "The Rag."

"It is a principle of general application in Anglo-American jurisprudence that one is not bound by a judgment in personam in a litigation in which he is not designated as a party or to which he has not been made a party by the service of process," *Hansberry v. Lee,* 311 U.S. 32, 40 (1940). The question of whether the Young Democrats and the Young Socialists were parties to the state court proceeding is, of course, not to be determined by what transpired in the federal court but rather what occurred

---

[11] The Regents' pleadings in state court were amended on November 20, 1969, two weeks after the Young Democrats and others had sought to become plaintiffs in the federal court proceeding by their amended complaint (A. 22-30). Although the amended pleading added a number of new defendants it did not name as defendants the Young Democrats or any of the other persons seeking to become plaintiffs in federal court. Regents' argument (Brief, p. 29) that "both the state court and the federal court . . . knew that 'Part A' plaintiffs and 'Part B' plaintiffs were parts of the same class . . ." is utterly dehors the record. Nothing filed in the state court suggested that there was anything involved other than the sale of "The Rag" on the University of Texas campus and the state court judgment reflects that this was the only matter presented (A. 80-82).

in the state court.[12] Although "the judgment in a 'class' of 'representative' suit, to which some members of the class are parties, may bind members of the class or those represented who were not made parties to it," *Hansberry* v. *Lee,* 311 U.S. at 41, the state court pleading did not contain the class action allegations contemplated by Rule 42 of the Texas Rules of Civil Procedure. But, even if the pleadings were adequate to create a class action, the class created was limited to those engaged in "selling and distributing for a valuable consideration or causing to be sold and distributed for a valuable consideration a newspaper known as 'The Rag' " (A. 91), a class that did not embrace either the Young Democrats or Young Socialists. Taking one more step, if somehow the "class" described in Regents' state pleading did encompass the federal plaintiffs, at best it was a spurious class[13] and "no one is bound . . . except named parties, all who authorize a named party to represent them, all intervenors, and all who claim under any of such persons," McDonald, Texas Civil Practice, Vol. I,

---

[12] If one looks only to the federal proceeding to determine the relationship of the parties the result is the same. The Young Democrats and the Young Socialists did not purport to become members of the original class described as persons who may be now or in the future associated or engaged in the publication and/or distribution of "The Rag" (A. 4). Rather, they sought joinder under Rule 20, which "neither has, nor was intended to have, any effect on the substantive rights of the parties," *Lansburgh and Bros.* v. *Clark,* 127 F.2d 331 (D.C. Cir., 1942), and "although plaintiffs may be joined in one action their claims remain as separate and distinct as if asserted in separate actions." Barron and Holtzoff, Wright, *Federal Practice and Procedure,* §532 at 183.

[13] Texas Rule 42 had adopted the old federal rule and in 42(a)(3) provided "when the character of the right sought to be enforced for or against the class is several, and there is a common question of law or fact affecting the several rights and a common relief is sought." Tex. R. Civ. P. 42.

Section 3.37 (1965 Revision). The Young Democrats and Young Socialists fit none of these categories.

Res judicata does not attach for a different reason that is of equal weight. The state court simply granted a temporary injunction, and res judicata attaches only to final judgments, *G. C. Merriam Co.* v. *Saalfield,* 241 U.S. 22 (1916).

The grant of a temporary injunction under Texas practice will not sustain a plea of res judicata. The Texas Supreme Court is explicit on the subject, "The order granting the temporary injunction could not be the basis of res adjudicata since it is only an interlocutory order," *Miers* v. *Brouse,* 154 Tex. 54, 271 S.W.2d 419, 421 (1954). Consistent with this view of the nature of a temporary injunction, appellate review of the grant of a temporary injunction is quite narrow, and is to be reversed on appeal only on a showing of "clear abuse of discretion by the trial court." *Texas Foundries* v. *International Molders Union,* 151 Tex. 239, 248 S.W.2d 460, 462 (1952).

The grant of temporary injunctive relief by the state court against the distribution of "The Rag" did not involve the present parties or those in privy with them, was not a final judgment, and will not sustain the plea of res judicata.

C. *The Court's judgment does not transgress the Section 2283 prohibition*

Regents' brief raises for the first time a claim that the judgment of the three-judge court "prohibits any steps to have the pending state court action set down for a hearing on the merits and the temporary injunction made permanent" (Brief, p. 31). This argument of the Regents is contrary to the record and distorts the manifest intent

of the court below. The court was at great pains to avoid interference with the state court proceeding, and its original order (A. 42) dismissed the plaintiffs that sought to impede the state court proceeding "so that there will be no interference with the state court's exercise of its jurisdiction." This was reaffirmed in the Court's memorandum opinion reflecting it had "refused the original plaintiffs' declaratory injunctive relief and dismissed them as plaintiffs so that there would be no interference with state judge's adjudication of the proceedings pending against them in state court" (A. 165).

Counsel for the Regents recognized that the court did not intend to interfere with the state court proceeding and argued that it should not grant relief to the Young Democrats because "we are going to have the situation where the people publishing 'The Rag' still can't sell 'The Rag' out there on the campus, and the Young Democrats can go out there and sell their tracts." (Transcript of Proceedings, June 26, at page 43.)

The court's judgment restrained the Regents "from further enforcement against the Plaintiffs of Article 6.11 and 6.12" (A. 177). "Plaintiffs" in this context clearly did not include the original plaintiffs who had been dismissed some nine months earlier (A. 41-43). The court's judgment granted plaintiffs' motion for summary judgment, and the motion had been made only on behalf of "plaintiffs in Part B of this action together with the Young Socialist Alliance" (A. 56). A judgment is "to be interpreted in the light of the court's opinion, findings, and conclusions of law," *Great Lakes Dredge Co.* v. *Huffman*, 319 U.S. 293, 295 (1943). The court's opinion and findings make it obvious that there was no intention "to stay proceedings in a state court" and

hence the prohibitions of 2283 are inapposite, as are the decisions discussed in the Regents' brief.

D. *The District Court was not required to abstain*

Although not expressly presented by the Regents' points, the reliance upon *Younger* v. *Harris,* —— U.S. ——, 91 S. Ct. 746 (1971) certainly gives rise to the question of abstention. At the outset the procedural maze clouds the question. However, for purposes of analysis we should be able to assume that the Young Democrats and Young Socialists simply originated this action to seek relief from Regents Rules.[14] Does the mere pendency in the state court of the Regents' action against "The Rag" preclude the district court from proceeding with the claims of the Democrats and Socialists? If so, it reflects a major extension of existing abstention doctrine and poses substantial frustration to the right of a litigant to select his forum.[15]

Once the district court dismissed the plaintiffs who were defendants in the state court, there was no reason for the federal court to stay its hand. For the "rule is well recognized that the pendency of an action in the state court is no bar to proceedings concerning the same matter in the Federal court having jurisdiction . . . The Federal jurisdic-

[14] This was certainly the posture of the case when it came on for hearing. Granting that the case was initiated by plaintiffs whose participation gave rise to more serious abstention problems, when those plaintiffs were dismissed from the action the abstention problems they posed disappeared with them. It makes no sense to visit upon the remaining plaintiffs the disabilities of the departed plaintiffs, to do so would smack of some outmoded notions of bastardy.

[15] Such reasoning would presumably require a district court in the Northern District of Texas to abstain if suit had been instituted by the Young Socialists, or the Young Republicans for that matter, attacking the Regents' solicitation rules as applied to the campus at the University of Texas at Arlington.

tion may be invoked and the cause carried to judgment, notwithstanding a state court may also have taken jurisdiction of the same case," *McClellan* v. *Carland,* 217 U.S. 268, 282 (1910). As Professor Wright views it, to require a federal court to refuse to hear an action or to stay an action merely because of the "pendency of an action in personam in state court" is "beyond anything required by the demands of federalism that are at the heart of the abstention doctrines." Wright, *Handbook of the Law of Federal Courts,* §52 at p. 205 (2nd Ed., 1970). As an argument for abstention we have at most related issues pending before the federal and state courts.[16] But surely our "demands of federalism" do not require the federal court to abdicate its jurisdiction merely because a related issue is pending before a state tribunal.

Nothing in the court's opinion in *Younger* v. *Harris,* —— U.S. ——, 91 S. Ct. 746, 752 fn. 4 (1971), or its companions, requires abstention. The *Younger* opinion was at pains to note that "an injunction against allegedly unconstitutional state action (discharging the employees) that is not part of a criminal prosecution" would raise "no special problem" of comity to the federal judiciary. Similarly these plaintiffs present "no special problem," for all they asked was the District Court to restrain the Regents from enforcement of an unconstitutional regulation against the Young Socialists and the Young Democrats. The organiza-

[16] The similarity of the issues between the state and federal proceeding is a matter of some dispute. In opposing joinder by the Young Democrats the Regents asserted that it was "difficult" for them to see how the claims of the Young Democrats and "The Rag" arose from the same transaction, and "impossible to see any question of law or fact common to them" (A. 34).

tions could not violate the regulations without risking loss of status as a registered student organization.[17]

Abstention may also be appropriate "where resolution of the federal constitutional question is dependent upon, or may be materially altered by the determination of an uncertain issue of state law," *Harman* v. *Forssenius,* 380 U.S. 528, 534 (1965) but this doctrine "contemplates that deference to state court adjudication only be made where the issue of state law is uncertain" (*Ibid.*), and "abstention cannot be ordered simply to give state courts the first opportunity to vindicate the federal claim," *Zwickler* v. *Koota,* 389 U.S. 241, 251. Here we have "the naked question, uncomplicated by an unresolved state law" of whether the Regents' rule as "construed and applied" [18] to the Young Socialists and the Young Democrats deprived them of protections assured by the First and Fourteenth Amendments, *Wisconsin* v. *Constantineau,* —— U.S. ——, 91 S. Ct. 507, 511 (1971.) The right of the Young Democrats and the Young Socialists to "choose a Federal court . . . cannot be properly denied," *Willcox* v. *Consolidated Gas Co.,* 212 U.S. 19 (1909) and there "are fundamental objections to any conclusion that a litigant who has 'properly invoked the jurisdiction of a Federal District Court to consider federal constitutional claims can be compelled, without his consent and through no fault of his own, to accept instead a state court's determination of those claims," *England* v. *Louisiana State Board,* 375 U.S. 411, 415 (1964). The Young Demo-

[17] This seems a precise parallel to the plight of the employee confronted with the unconstitutional loyalty oath in *Baggett* v. *Bullitt,* 377 U.S. 360 (1964).

[18] The court's opinion in *Younger* v. *Harris* noted the propriety of injunction against state statutes "held to be vague or overly broad as construed *and applied,*" 91 S. Ct. at 752, fn. 4.

crats and the Young Socialists properly invoked the jurisdiction of the federal court to consider claims that the Regents' rules as applied to their organizations deprived them of rights secured by the First and Fourteenth Amendments. The district court was not required to abstain merely because a related question was pending in the state court in a case involving neither the Young Democrats nor the Young Socialists.

II.

The Regents' Rules violate the speech and association rights of the Young Democrats and Young Socialists.

A. *The nature of the issue*

The Young Democrats and the Young Socialists sought the right to solicit and/or accept dues or contributions to their organizations and to levy a charge for political literature, whether it be the Socialists' "The Militant" [19] or the Young Democrats' "Axe Erwin" [20] bumper stickers. The organizations sought to do these things only in the same areas of the campus where they are presently permitted to erect booths and distribute literature, circulate petitions and engage in other forms of speech related activities, i.e. the West and Main Malls of the University Campus (A. 59,

---

[19] The Young Socialists sell "The Militant," the weekly paper of the Socialist Workers Party "not for the purpose of making a profit for the organization but solely to disseminate political speech" (A. 61-62).

[20] The Young Democrats obtained permission to distribute literature as part of their "statewide axe Erwin drive" (A. 139), Erwin being the Chairman of the Defendant Board of Regents; although permitted to distribute their literature, they could not recoup the printing costs of their bumper stickers by charging for them.

62, 63). The Regents' rules (6.11 and 6.12)[21] denied these two political organizations the right to solicit dues and contributions or sell political literature on the West and Main Malls of the campus and the organizations were compelled to refrain from such activities in the face of disciplinary threats by the University administration (A. 59-65).[22] Although the West and Main Malls of the campus were closed to the Young Democrats and Young Socialists by the solicitation regulations, these campus areas were open to student organizations for the distribution of literature of all kinds (A. 137-139) and open for commercial activities sanctioned by the University, including sale of University approved publications (A. 131), sale of tickets to various activities occurring on the University campus (A. 133), sale of "cookies and coffee to raise funds for departmental scholarships" (A. 135) and solicitation of contributions for charitable purposes (A. 135).

It was undisputed, and the court so found, that the University regulations as applied to the Young Democrats and Young Socialists "seriously impede the associational activities of the organizations, primarily because the rules decrease their ability to procure both members and funds" (A. 168).

---

[21] As the court below found, "It is not clear, however, which of the two rules questioned prohibit the activities engaged in by the plaintiffs" (A. 169).

[22] Both the Young Democrats and Young Socialists were registered student organizations, and University disciplinary proceedings could result in the loss of their registered status.

B. *The University campus is an appropriate place for the exercise of First Amendment freedoms*

The regents of a university, just as the officials of a municipality, "may not abridge the individual liberties secured by the Constitution to those who wish to speak, write, print or circulate information or opinion," *Schneider* v. *State,* 308 U.S. 147, 160 (1939) and "one is not to have the exercise of his liberty of expression in appropriate places abridged on the plea that it may be exercised in some other place," *Id.* at 163.

"The essentiality of freedom in the community of American universities is almost self-evident," *Sweezy* v. *New Hampshire,* 354 U.S. 234, 250 (1957). The Universities "are educating the young for citizenship" [23] and hence there is every reason for "scrupulous protection of Constitutional freedoms," *West Virginia Board of Education* v. *Barnette,* 319 U.S. 624, 637 (1943), and "In the absence of a specific showing of constitutionally valid reasons to regulate their speech, students are entitled to freedom of expression of their views," *Tinker* v. *Des Moines Independent School District,* 393 U.S. 503, 511 (1968). "The fact that the state has a proprietary interest in the land and buildings is an irrelevancy," Wright, *The Constitution on the Campus,* 22 Vand. L. Rev., 1027, 1039 (1969).

---

[23] On the campus of the University of Texas we are now dealing virtually exclusively with students of a voting age; with the eligibility of eighteen year olds to vote, approximately 1% of the student body is under voting age. Even before those under 21 years of age became eligible to vote, a majority of the students at the University of Texas were of voting age, for the school year beginning 1969 over 19,000 of the 35,000 students were 21 years of age or over ("Report of Distribution of Students by Age and Sex" prepared by the Registrar of the University of Texas at Austin).

C. *The regulations constituted an unreasonable direct restraint upon speech*

Although loath to be overly simplistic, we consider the regulations to be invalid because they impose a direct restraint upon speech through the guise of limiting solicitations, a "restraint" which cannot be justified because the self-same regulations permit comparable activities, thus belying the purported justification for the regulation.

To justify their rules, the Regents assert that these were simply restrictions upon solicitation necessary to prohibit commercial activity from interfering with the University functions (A. 152-156). In their brief below the Regents contended that their rules "do not restrict freedom of speech or press except as it is incidental to the activity of solicitation" (Brief, p. 19).

> "To this contention there are two answers. The first is that a State cannot foreclose the exercise of constitutional rights by mere labels. The second is that abstract discussion is not the only species of communication which the Constitution protects . . ." *NAACP* v. *Button,* 371 U.S. 415, 429 (1963).

The activity which the Young Democrats and Young Socialists seek to pursue is protected First Amendment speech. The fact that there is a commercial quality "is as immaterial in this connection as is the fact that newspapers and books are sold." *New York Times* v. *Sullivan,* 376 U.S. 254, 266 (1964) for "commercial activity, in itself, is no justification for narrowing the protection of expression secured by the First Amendment." *Ginzberg* v. *United States,* 383 U.S. 463, 474 (1966). As the record conclusively demonstrates, we are dealing with regulations "which actu-

ally affect the exercise" of First Amendment rights, and these regulations may not be "sustained merely because they were enacted for the purpose of dealing with some evil" within the Regents' competence, *United Mine Workers* v. *Illinois Bar Association,* 389 U.S. 217, 222 (1967).

If we take the Regents at their word and assume that the regulations are designed to prevent interference "with the academic activities of the institution" (A. 153), there is no rational distinction to be drawn between permitting the sale of balloons for charitable purposes (A. 135) and prohibiting the sale of "The Militant" by the Socialist from an adjoining booth (A. 63). As the court below found, the Regents have simply failed to show any "compelling" interest to justify the impingement upon "high order First Amendment rights" (A. 170).

D. *The regulations suffer from unconstitutional vagueness and overbreadth*

The rule against vagueness "requires that the regulation be drawn with sufficient specificity so that persons seeking to exercise First Amendment rights, as well as those attempting to enforce the regulation, will know definitely what is being prohibited."[24] Although we did not specifically attack the regulations on the ground of vagueness below, we here assert that the regulations are "vague or overly broad as construed and *applied,*" *Younger* v. *Harris,* —— U.S. ——, 91 S. Ct. 746, 752 fn. 4.

The court below reacted to the "ambiguity" of the regulations noting its inability to determine "which of the two rules questioned prohibit the activities engaged in by the

[24] Emerson, *The System of Freedom of Expression,* at 364 (Random House, 1970).

plaintiffs" (A. 169). The vice of vagueness has been worsened, if anything, by the Regents' concession of partial unconstitutionality of Rule 6.12 (Brief, p. 41). The regulations are unconscionably vague. Further they are as the court below found "unconstitutionally overbroad" (A. 171), *Elfbrandt* v. *Russell,* 384 U.S. 11 (1966).

E. *The regulations under attack must fall as simple licensing regulations*

The commercial solicitation prohibition contained in 6.11 permits the sale of "any publication authorized by an agency of a component institution" without specifying any guidelines to the agency head in determining whether to permit the distribution and sale of the publication. The non-commercial solicitation prohibition contained in 6.12 permits solicitations with the approval of the institutional head when such solicitations are "for solicitation or fund raising for the needy or suffering, relief of the poor, or for public benevolent purposes . . . " We are left to surmise what constitute "public benevolent purposes" as are the institutional heads who are charged with the administration of this regulation. In both instances the regulations confer uncontrolled discretion upon the institutional head to grant or withhold the privilege. Thus the regulations are invalid on their face because they make enjoyment of the constitutional guarantee contingent upon the will of the institutional head, *Staub* v. *Baxley,* 355 U.S. 313 (1958).

CONCLUSION

Appellees respectfully submit that if jurisdiction is accepted the judgment of the court below should be affirmed in all respects.

Respectfully submitted,

DAVID R. RICHARDS
CLINTON & RICHARDS
600 West 7th
Austin, Texas 78701
Attorneys for Appellees

MELVIN L. WULF
American Civil Liberties
Union Foundation
New York, N. Y. 10010
of Counsel

July 1971

BOARD OF REGENTS OF THE UNIVERSITY OF TEXAS SYSTEM *v.* NEW LEFT EDUCATION PROJECT ET AL.

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF TEXAS

No. 70-55. Argued December 6, 1971—Decided January 24, 1972

Three-judge district court was improperly convened under 28 U. S. C. § 2281 to consider constitutionality of appellant's rules for campus distribution of certain kinds of literature and for dues solicitation from members of political organizations since challenged rules do not have statewide applicability or effectuate statewide policy but affect only the few of the State's higher education institutions that are under appellant's jurisdiction; and the appeal from that court's judgment should therefore have been taken to the Court of Appeals and not this Court. Pp. 542–545.

326 F. Supp. 158, vacated and remanded.

WHITE, J., delivered the opinion of the Court, in which BURGER, C. J., and BRENNAN, STEWART, MARSHALL, and BLACKMUN, JJ., joined. DOUGLAS, J., filed a dissenting opinion, *post*, p. 545. POWELL and REHNQUIST, JJ., took no part in the consideration or decision of the case.

W. O. Shultz II, Assistant Attorney General of Texas, argued the cause for appellant. With him on the brief were *Crawford C. Martin,* Attorney General, *Nola White,* First Assistant Attorney General, *Alfred Walker,* Executive Assistant Attorney General, and *J. C. Davis, Pat Bailey,* and *James C. McCoy,* Assistant Attorneys General.

David R. Richards argued the cause for appellees. With him on the brief was *Melvin L. Wulf.*

MR. JUSTICE WHITE delivered the opinion of the Court.

This case comes here on direct appeal from the ruling of a three-judge court declaring unconstitutional and enjoining enforcement of two sections of the Rules and

Regulations of appellant Board of Regents of the University of Texas System. 326 F. Supp. 158 (1970). We postponed consideration of our jurisdiction to a hearing on the merits. 401 U. S. 935 (1971). For reasons explained below, we have concluded that we lack jurisdiction of this appeal.

This litigation began when the Board of Regents sued the New Left Education Project and certain individuals in a Texas court. In that suit, the Regents sought to restrain defendants from distributing a newspaper and making either commercial or noncommercial solicitations on the Austin campus of the University of Texas except in compliance with appellant's rules. Defendants countered by bringing this federal suit to enjoin further state court proceedings on the ground that the rules that the Regents sought to enforce abridged defendants' First Amendment rights. A three-judge court met and determined that it was properly convened pursuant to 28 U. S. C. § 2281. It then permitted certain other organizations and individuals, including appellees here, to join the suit as plaintiffs and dismissed the action as to those involved in the state court adjudication. Thereafter, the court granted summary judgment in favor of appellees, declaring unconstitutional and permanently enjoining enforcement of two rules, Regents' Rules & Regs., c. VI, pt. 1, §§ 6.11, 6.12 (App. 173), governing the campus distribution of certain kinds of literature and the solicitation of dues from members of political organizations.

We have jurisdiction to review directly the lower court's order granting an injunction only if the case was one required to be heard and determined by a three-judge court. 28 U. S. C. § 1253. Such a court is required where the challenged statute or regulation, albeit created or authorized by a state legislature, has statewide application or effectuates a statewide policy. But a single judge, not a three-judge court, must hear the case where the statute or regulation is of only local import. *Moody*

v. *Flowers*, 387 U. S. 97 (1967); *Rorick* v. *Board of Commissioners*, 307 U. S. 208 (1939); *Ex parte Public National Bank*, 278 U. S. 101 (1928); *Ex parte Collins*, 277 U. S. 565 (1928). This rule achieves the congressional purpose of saving statewide regulatory legislation from invalidation through ordinary federal court equity suits, minimizes the burden that the three-judge court places upon the federal judiciary, and avoids unduly expanding the Court's carefully limited appellate jurisdiction. *Phillips* v. *United States*, 312 U. S. 246, 250 (1941). Thus, the "term 'statute' in § 2281 does not encompass local ordinances or resolutions," *Moody* v. *Flowers*, *supra*, at 101, nor does it include a state statute having only a local impact, even if administered by a state official. *Rorick* v. *Board of Commissioners*, *supra*.

Appellant Board of Regents was created by the Texas Legislature and is charged with governing those educational institutions in the University of Texas System. Texas Rev. Civ. Stat. Ann., Art. 2585 (1965). This governance, which specifically includes a rulemaking power, *ibid.*, extends to but three of the 23 four-year state colleges and universities listed in the Higher Education Coordinating Act of 1965, *id.*, Art. 2919e–2, § 2 (Supp. 1970–1971): the University of Texas at Austin, El Paso, and Arlington.[1] In addition to the 20 senior colleges and universities for which appellant bears no responsibility, Texas has at least 31 public junior colleges that are not within the University of Texas System. *Ibid.* It is true that the Board of Regents governs numerous medical and other specialized schools and branches, *id.*, Arts. 2603e to 2603i, 2606b to 2606d, but these are only some of the specialized institutions that Texas denominates as agencies of higher education.

[1] Appellant also mentions the University of Texas at San Antonio and Permian Basin but does not take issue with appellees' contention that these schools are merely in the planning stage (Brief for Appellees 2 n. 1).

Id., Art. 2919e–2, §§ 2 (e)–(g) (Supp. 1970–1971). It is therefore apparent that the Regents' rulemaking power and the rules at issue in this litigation extend to but a fraction of the campuses in the Texas system of higher public education. These rules can scarcely be described as matters of statewide concern or expressions of a statewide policy when a large percentage of Texas colleges and universities are unaffected by them and could not be affected by any pronouncement that a federal court might make on their constitutionality. There is no suggestion or indication of any kind that the Regents' rules are similar to those for other schools or are required by or express statewide policy.[2]

---

[2] It has long been settled that a three-judge court is proper even in a suit against a local official, although localized in his geographic activities and mode of his selection, when he is engaged in enforcing a policy of statewide application whose constitutionality is challenged. *Spielman Motor Sales Co.* v. *Dodge*, 295 U. S. 89 (1935); *Rorick* v. *Board of Commissioners*, 307 U. S. 208, 212 (1939). The thrust of our more recent decision in *Alabama State Teachers Assn.* v. *Alabama Public School and College Authority*, 393 U. S. 400 (1969), is to the same effect. The issue there was a legislative direction to the Alabama Public School and Housing Authority to issue bonds for the construction of a public university in Montgomery, Alabama. Appellants challenged that action, although having a local impact, as expressive of an official, statewide policy to maintain a racially identifiable, dual system of education, and the District Court denied relief. The dissent on the merits from summary affirmance, disagreeing with Justice Harlan's dissent on jurisdictional grounds, agreed that a statewide policy was sufficiently implicated to sustain the jurisdiction of the three-judge court and the direct appeal here. *Board of Visitors* v. *Norris*, *post*, p. 907, aff'g 327 F. Supp. 1368 (ED Va. 1971), rests upon the same basis. In *McLaurin* v. *Oklahoma State Regents*, 339 U. S. 637 (1950), the Court entertained an appeal from the judgment of a three-judge District Court upholding an Oklahoma statute providing that Negroes, though admissible to white graduate schools, must get that education on a segregated basis.

Nothing in the record before us in this case indicates that the regulations challenged here represent general state policy, reflect a

The situation here is comparable to that in *Moody* v. *Flowers, supra,* where we held that three-judge courts were improperly convened to consider challenges to a state statute applying to a particular county and to a county charter based upon a state statute. The fact that several campuses over which the Board of Regents has jurisdiction are located in different parts of the State does not in our view make their rules of general applicability for the purpose of 28 U. S. C. § 2281. These rules, applying only to some of the higher educational institutions of the State, are of limited significance and do not partake of the quality and dignity of those state statutes or policies that three-judge courts were designed to consider. We are persuaded that a contrary view of this case would be inconsistent with our oft-repeated admonition that the three-judge court statute is to be strictly construed. *E. g., Allen* v. *State Board of Elections,* 393 U. S. 544 (1969); *Phillips* v. *United States,* 312 U. S., at 251.

Since the three-judge court was improperly convened, appeal lies not here but to the Court of Appeals for the Fifth Circuit. So that appellant may be able, if it desires, to perfect a timely appeal, we vacate the judgment below and remand the case with instruction that the court enter a fresh decree. *Phillips* v. *United States, supra,* at 254.

Judgment vacated and remanded.

MR. JUSTICE POWELL and MR. JUSTICE REHNQUIST took no part in the consideration or decision of this case.

MR. JUSTICE DOUGLAS, dissenting.

When I authored *Moody* v. *Flowers,* 387 U. S. 97, I thought I was writing a chapter on federalism within

statutory command, or apply to more than a fraction of the Texas higher educational institutions. It is thus difficult to understand the dissent's reliance on the *Alabama, Norris,* and *McLaurin* cases.